Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF THE CITY OF CORVALLIS, OREGON

I. INTRODUCTION

The City of Corvallis ("Corvallis" or the "City") submits the following comments on the Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. Corvallis thanks the Commission for providing the opportunity to explain the reasons underlying the City's strong opposition to certain tentative conclusions in the FNPRM that: 1) what the FNPRM misconstrues as cable-related "in-kind" contributions constitute franchise fees; and 2) that Corvallis and other municipalities lack authority to regulate the placement of equipment and facilities in the public right of way ("ROW") by cable operators to provide non-cable services.

Corvallis has a population of almost 60,000 and is home to Oregon State University, with a student body of approximately 30,000. We have a large regional medical facility, as well as several large technology and research companies. In June, Comcast reported over 20,800 cable subscribers, and their services are valued in our community both by residents and businesses. In addition, the cable franchise fees support city services that our community members desire. The City estimates that the FNPRM would reduce cable franchise fee revenues by approximately sixteen percent (16%), and our general fund by approximately $120,000, while at the same time ceding partial control of one of the City's largest assets (the ROW itself) to private industry. Accordingly, Corvallis respectfully requests that the Commission decline to adopt the FNPRM in its current form.

II. NEGOTIATED FRANCHISE REQUIREMENTS ARE NOT FRANCHISE FEES

The FNPRM tentatively concludes that "build-out obligations that are not specifically for the use or benefit of the LFA . . . should not be considered contributions to an LFA."[1] The City agrees with that tentative conclusion, and requests that the Commission extend that reasoning in declining to construe other contributions as franchise fee that are not for the benefit of a local franchise authority ("LFA"), but for the benefit of the general public. Because customer service requirements, the provision of PEG channels, and other related franchise obligations are intended to directly benefit the general public, not specifically the LFA, those benefits are distinct and completely separate from franchise fees paid to LFAs. As explained below, the benefits intended to run to the general public are not lumped together with franchise fees payable to LFAs. Therefore, the two should not be lumped together by the Commission.

Comcast has been operating in Corvallis under a franchise that expired by its own terms in 2013. The parties have been negotiating – on-and-off – since before 2013, but to date have been unable to come to agreement as to terms of a new franchise. Nevertheless, under federal law an existing franchise continues to apply while parties are engaged in renewal negotiations.[2] Under the express terms of Comcast's franchise:

> No term or condition in this Franchise shall in any way modify or affect [Comcast's] obligation to pay Franchise fees. Although the total sum of Franchise fee payments and additional commitments set forth elsewhere in this Franchise may total more than five

[1] FNPRM ¶ 21.
[2] 47 U.S.C. §546.

> percent (5%) of [Comcast's] Gross Revenues in any twelve (12) month period, [Comcast] agrees that the additional commitments herein are not Franchise fees as defined under any federal law to the extent consistent with applicable federal law, nor are they to be offset or credited against any Franchise fee payments due to the City.

Elsewhere the franchise also provides the following:

> [Comcast] agrees that PEG I-Net Capital Support . . . shall in no way modify or otherwise affect [Comcast's] obligations to pay Franchise fees to the City. [Comcast] agrees that although the sum of Franchise fees and the payments set forth in this Section may total more than five percent (5%) of [Comcast's] Gross Revenues in any twelve (12) month period, the additional commitments shall not be offset or otherwise credited in any way against any Franchise fee payments under this Franchise.

In other words, the understanding originally reached by the parties in 2003, and that continues to apply, is that – unlike the five percent franchise fees paid to the City – the other benefits provided under the terms of the franchise (specifically for the benefit of the general public and not for the benefit of the City) do not accrue to the City but rather are benefits provided to the public.

A closer inspection of other provisions of the franchise supports the conclusion that franchise fees are separate and distinct from other negotiated benefits provided by the terms of the franchise. For example, under the franchise Comcast agrees to "provide an amount equal to $1.00 per Residential Subscriber per month for capital support for PEG Access and for capital support of the I-Net" and authorizing Comcast to "pass through and include such payment on the bills of Residential Subscribers." These fees are excluded from the five percent cap and, unlike franchise fees, the City is not free to spend those funds in any way that it sees fit, or to retain such fees when the franchise comes to an end. The franchise specifies, "At the end of the Franchise, the City may carry over any unspent amount into any succeeding franchise with [Comcast], or return such amount to Residential Subscribers." The non-fee benefits provided pursuant to the terms of the franchise negotiated between Comcast and Corvallis are much more akin to these recognized non-franchise fee payments (and what they pay for) than they are to franchise fees paid to the City by Comcast for its use of the City ROW.

The franchise already requires the City to reimburse Comcast for many of the expenses it incurs under the terms of the franchise. For example, regarding funding and maintaining the I-Net, the franchise provides that "[t]he actual cost of constructing and/or maintaining all portions of the I-Net . . . shall be paid to [Comcast] as determined by the City through the use of PEG Access/I-Net Capital Support . . . from funding provided by I-Net Users, or other sources of revenue." Upon closer scrutinizing of Comcast's franchise with Corvallis, the hypothesis of the FNPRM that municipalities are already costing cable operators significantly more than the five percent cap unravels, as does the notion that what the FNPRM mislabels as additional "in kind" fringe benefits are being excessively exacted by municipalities and wholly funded by cable operators.

The FNPRM tentatively finds that, for franchises granted after 1984, "PEG capital costs required under the franchise are in-kind, cable-related contributions excluded from the five percent cap."[3] But what does that mean in the context of franchises such as the one granted to Comcast by Corvallis, where the mutually negotiated franchise does not clearly distinguish between what are PEG capital costs and what are not, where Comcast may already be receiving reimbursement for providing certain benefits, and where the funding source of any given benefit

[3] FNPRM ¶ 19.

may be partially deductible and partially non-deductible? What does the vague term "in kind" cover? Further, even if the source of those deductible costs were somehow entirely traceable, how are cable operators and LFAs to agree on what value to assign when the FNPRM tentatively requires valuation "for purposes of the franchise fee cap at their fair market value"?[4] This tentative conclusion of the FNPRM would significantly disrupt and interfere with the carefully negotiated franchise agreement Corvallis has in place with Comcast, create chaos for franchise administration by the City, do irreparable harm to established City programs, and no doubt have the same effect on other LFAs nationwide.

The FNPRM would potentially treat PEG channel capacity, transmission programming, the I-Net and the provision of local customer service standards as misnomered "in-kind" franchise fees, when funding for those partially comes from other than such incorrectly labeled "in-kind" contributions. The FNPRM mistakenly assumes that the funding for those services comes solely from one source, and flows only to the LFA as the sole beneficiary. As explained above, that is an inaccurate oversimplification of how cable franchises are drafted and administered. Corvallis therefore respectfully requests that the Commission reject the tentative conclusion in the FNPRM that a simple and overbroad, blanket formula can be applied to allow for the deduction from franchise fee payments of what is mischaracterized as "in kind" deductions. If the Commission is not willing to abandon this misguided approach, then Corvallis requests that the Commission limit its application only prospectively, so as to avoid interfering

[4] FNPRM ¶ 24. This tentative conclusion of the FNPRM calling for "fair market" valuation stands in stark contrast to and is inconsistent with the Committee's conclusion in its Third Declaratory Ruling and Third Report and Order, WC Docket No 17-84/WT Docket No 17-79 ("Third Report and Order"), which limits fees municipalities can charge for the placement of Small Wireless Facility infrastructure in the ROW by private wireless service providers to "a reasonable approximation of the locality's reasonable *costs*" (emphases added). *See* Third Report and Order ¶ 11.

with the administration of currently existing franchises that have been carefully negotiated between cable operators and LFAs.

III. THE COMMISSION SHOULD NOT ATTEMPT TO PREEMPT LOCAL GOVERNMENTS FROM REGULATING THE PLACEMENT OF NON-CABLE EQUIPMENT AND FACILITIES IN THE RIGHT OF WAY BY CABLE OPERATORS.

As pertains to the FNPRM's proposed preemption of the City's ability to regulate the placement of non-cable equipment and facilities in the right of way by cable operators, Corvallis previously submitted a letter in response to comments filed in WC Docket No. 17-84 by the Internet and Television Association (the "NCTA"), but it bears highlighting those comments again in the context of the FNPRM. NCTA referenced a "community in Oregon" that "has refused to issue permits allowing installation of Wi-Fi equipment" without naming the community, but it is clear from the facts provided that the community being discussed is Corvallis. As explained above, Comcast is operating in Corvallis under a franchise that expired in 2013. Contrary to NCTA's portrayal, Comcast in fact simply placed non-cable equipment in the ROW, without notice to or authorization from Corvallis as required by the terms of Comcast's franchise.

Under the explicit terms of the franchise, such installations would require a construction permit for the work in the ROW. The franchise requires Comcast to obtain "[a]ny permit, agreement, or authorization required by the City for Public Right-of-Way users in connection with operators on or in Public Rights-of-Way or public property including, by way of example and not limitation, Street cut permits." The franchise also requires Comcast to operate in the ROW "in compliance with all applicable City construction codes and procedures." Comcast neither applied for the necessary permits, nor consulted with the City prior to installing its non-cable equipment in the City's ROW.

If the tentative conclusion of the FNPRM is allowed to stand that LFAs are prohibited from regulating non-cable equipment and facilities placed in the ROW by cable operators, then Comcast's behavior and attitude toward Corvallis will serve as a case study of what is to come for LFAs in the near future. Regulation of the ROW at the local level is of paramount importance from a public safety perspective, and local commerce depends on a functioning and regulated local ROW system as well. The FNPRM's tentative conclusion preempting the ability of LFAs to regulate non-cable equipment and facilities placed in the ROW by cable operators poses a serious threat to both. Corvallis therefore respectfully requests that the Commission reject the tentative conclusion in the FNPRM that LFAs are so preempted.

IV. CONCLUSION

Based on the foregoing, the City of Corvallis strongly opposes the FNPRM's tentative conclusions that negotiated franchise requirements constitute "in-kind" franchise fees, as well as its tentative conclusion that LFAs are preempted from regulating the placement of non-cable equipment and facilities by cable operationr in the ROW.

Respectfully submitted,

Spencer Q. Parsons
Beery, Elsner & Hammond, LLP
1750 SW Harbor Way, Suite 380
Portland, OR 97201-5106
503.226.7191 (phone)
503.226.2348 (fax)

Counsel for the City of Corvallis, Oregon

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